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In The

Supreme Court of the United States

79-589

October Term, 1979
No.

HOWARD L. LULL and BARBARA B. LULL,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETER W. HERBY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The petitioners Howard L. Lull, Barbara B. Lull and Peter W. Herby respectfully pray that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on July 12, 1979.

OPINIONS BELOW

The judgment and opinion of the United States Court of Appeals not yet reported, appears in Appendix II hereto. The judgment and opinion of the United States Tax Court is set forth in T.C. 1978-74 and T.C. 1978-119 and appears in Appendix I hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on July 12, 1979. This petition is filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Whether to compel the petitioners who are Christians, against their conscience to pay that portion of their taxes budgeted for military preparation, constitutes an invasion of their inherent liberty protected by Amendment Nine of the United States Constitution?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Amendment Nine to the United States Constitution; Rule 120 of the United States Tax Court Rules of Practice and Procedure; 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

This writ arises from the judgment and opinion of the United States Court of Appeals for the Fourth Circuit affirming a decision of the United States Tax Court in favor of respondent against the petitioners in docket numbers 78-1565 and 78-1567.

Petitioners are Christians and therefore are conscientiously opposed to killing or the planning, preparation or participation for these purposes. The petitioners have refused to pay that portion of their 1974-1975 tax liability which equals the amount in those years budgeted for war. Respondent notified petitioners that the deductions were not allowable. Notice of statutory deficiencies were filed on petitioners by respondent who thereupon disallowed the claimed deductions. Petitioners exercised their right to present their claims to the United States Tax Court. Petitioners Lull relied upon Article VI of the United States Constitution and Amendments One and Nine thereto. Petitioner Herby relied on the First, Fifth and Ninth Amendments to the United States Constitution. Petitioners Lull's hearing was on March 15, 1977 and petitioner Herby's hearing was on July 27, 1977. Respondent was granted a motion for judgment on the pleadings against petitioners Lull on February 27, 1978 and a motion for summary judgment and a motion to dismiss against petitioner Herby on March 30, 1978.

Petitioners appealed to the United States Court of Appeals for the Fourth Circuit. On July 12, 1979 the Court rendered a judgment and opinion affirming per curiam respondent on the basis that petitioners "based their right to such deductions not on any Congressional grant but on their alleged conscientious religious objections to war and their alleged Constitutional protection of such religious objections under the First Amendment", and that such allegations were denied in the tax court. The appellate court found no error in the decisions of the tax court because of the reasons "so well stated by that Court in its opinions" (Appendix II, 15a).

However, the appellate court (as well as the tax court in the case of petitioners Lull) did not address either the written or oral arguments made by petitioners in respect to the Fifth and Ninth Amendments of the United States Constitution or Article VI thereof. This writ is filed for the purpose of compelling the Fourth Circuit Court of Appeals to guarantee the rights and liberties of the petitioners under the Ninth Amendment to the Constitution of the United States.

REASON FOR GRANTING THE WRIT

I.

THE DECISION BELOW, AS IT APPLIES TO PETITIONERS, CHRISTIANS, CONSTITUTES AN INVASION OF THEIR RETAINED RIGHTS PROTECTED BY AMENDMENT NINE OF THE CONSTITUTION OF THE UNITED STATES.

A. As citizens, the petitioners' right of conscience not to kill is protected by the Ninth Amendment to the Constitution of the United States.

1. Introduction.

The history of Christian conscientious objection and civil disobedience has been coupled with much suffering and struggle. In spite of this, the Christian conscience, at least in a remnant of that community, has held true to the belief that the all-pervading teaching of Jesus to love God and one another in the way He loved us mandates that a Christian cannot kill another person for any reason. For many Christians this teaching includes the refusal to pay for killing in the form of taxes for war. *See* Kaufman, *What Belongs to Caesar* (1969) and Stoner, *The Moral Equivalent of Disarmament,* Sojourners (Feb. 1979).

Respondent contends that to compel petitioners to pay for the killing of our neighbors is proper. But petitioners contend

that one who does not want to pay for killing should be free not to do so.

This petition addresses taxes for war, the Ninth Amendment to the United States Constitution and the rights of conscience as they relate to the Christian imperative to speak truth to power.

2. The Social Contract and the Ninth Amendment.

The Ninth Amendment recognizes that there are certain fundamental, inalienable rights (not enumerated in the Constitution, *i.e.,* unenumerated rights) which the people possess that are pre-existing to any Constitution, inherent in the individual and thus not subject to divestment either partially or completely by the state. These rights have also been called "natural", and are those held by an individual in a state of absolute liberty. In contracting to enter into a "state of society", the people collectively (and the person individually) only divest themselves of those natural rights that they expressly relinquished by enumeration.

In regard to that power which is delegated to the government for the protection of its citizens, only those powers which are given to the government may be exercised by the government according to Amendment Ten of the United States Constitution. All other powers are retained by the states or the people. Similarly, those rights of the people which have not been given to the government by enumeration are retained by the people and by the individual person under Amendment Nine of the United States Constitution. Because the Ninth and Tenth Amendments' social contract rights do not provide any source of power or right to the federal government or to the people *qua* government, they have not been sufficiently recognized in our court system. It was just this fear that the framers of the Constitution had which strangely enough caused them to include these two amendments. (Henceforth in this writ petitioners will

concentrate on the Ninth rather than the Tenth Amendment, for the Tenth Amendment talks about powers not delegated to the federal government but reserved to the states or the people *qua* government and petitioners are concerned with rights not delegated to the government but retained by the people as persons.)

3. Unenumerated Rights.

That this fundamental proposition of natural rights was well understood by the politicians and philosophers of the day is evident by the recognition given them in the Virginia Declaration of Rights adopted on June 12, 1776 at the Virginia Convention, the Convention which sought to establish limits to governmental power and the correlative preservation of retained rights in response to which was believed to be the growing tyranny of British domination. Although some, chiefly Hamilton and for a while Madison, were against the enumeration in any way of these inherent rights in the United States Constitution, Jefferson, Mason and Henry felt that they must be enumerated in some way. Hamilton did not see it logical to enumerate retained rights for they were by the very nature of the contract retained — if not delegated. Thus, to enumerate them in any way in a delegative document would enhance the possibility that these rights would no longer be retained but either usurped or qualified by their mention in the Constitution. On the other hand, Jefferson, Henry and Mason understood the logic, but were concerned about the power of despotic governments. If the rights were not enumerated, a despotic government could easily usurp them. All parties, however, recognized the logical inconsistency of enumerating unenumerated rights.

James Winthrop of Massachusetts insisted that "when the people institute government, they of course delegate all rights not expressly reserved." Ford (ed.) *Essays on the Constitution of the United States* at 112 (1892). This was the anti-Federalist fear. The Federalists insisted, however, that if a bill of rights were written, the fears of the anti-Federalists, particularly

Mason, Jefferson, etc., would be realized for an imperfect enumeration of rights and would imply that other rights had indeed been given to the federal government. Kelley, *The Uncertain Renaissance of the Ninth Amendment* at 33, University of Chicago Law Rev. 814, 818 (1966). James Wilson argued to the Pennsylvania ratifying convention:

> "In a government consisting of enumerated powers, such as is proposed of the United States, a bill of rights would not only be unnecessary, but in my humble judgment, highly imprudent. In all societies, there are many powers and rights which cannot be particularly enumerated . . . . If we attempt an enumeration, everything that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete." Elliot's *Debate on the Federal Constitution* at 436-37 (2nd Ed. 1836).

Alexander Hamilton, in *Federalist,* No. 84, likewise voiced this argument:

> "I do further, and affirm that the bill of rights, in the sense and to the extent they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and on this very account would afford a pretext to claim more than were granted."

The Virginia anti-Federalists, led by Patrick Henry, argued that the Articles of Confederation had expressly declared that every right was retained by the states respectively which was not given up to the government of the United States. He noted there

was no such thing in the United States Constitution. Making reference to the rights retained by the people as well as the rights retained by the states, he pointed out that there was no bill of rights against Congress to whom the United States Constitution had given full and exclusive possession of all power. III Elliot at 446. James Madison, the leading Federalist in Virginia, advanced the Wilson argument suggested in Pennsylvania in hopes of countering Henry's view. Madison contended that a bill of rights was unnecessary because "the general government had no power but what was given it." *Id.* at 626. He also was certain that no delegation to the federal government of any power would intrude upon the rights of individuals. Kelley at 819. Secondly, a bill of rights would be dangerous because it might "be implied that everything omitted is given to the general government." III Elliot at 620.

In the House of Representatives, James Jackson of Georgia, as opponent of the adoption of the Bill of Rights, stated this maxim as follows:

> "There is a maxim in law, and it will apply to bills of rights that when you enumerate exceptions, the exceptions operate to the exclusion of all circumstances that are omitted; consequently unless you except every right from the grant of power, those omitted are inferred to be resigned to the discretion of the government." I *Annals of Congress*, at 442 (1834).

Madison, by this time influenced by Jefferson from France, was swinging to the enumeration of certain fundamental rights coupled with some protection for those unenumerated rights which would be retained in spite of the enumeration. With this in mind, listening to the objections of Hamilton, Wilson and Jackson, he answered as follows: "It has been objected also against a bill of rights that, by enumerating particular exceptions to the grant of power, it would disparage those rights which

were not placed in that enumeration; and it might follow, by implication, that those rights which were not singled out, were intended to be assigned into the hands of the general government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I concede, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution." *Id.* at 439. This clause was amended by a select committee drafting the amendments, of which Madison was a member, to the language now contained in the Ninth Amendment.

In summary, Madison as well as those who follow him, such as Professor Dunbar writing in *James Madison and the Ninth Amendment*, 42 Va. Law Rev. 627, 643 (1956), were of the view that "by enumeration of rights in the Constitution nothing has been lost; that the rights of the people would have rested on as firm ground without enumeration, because they do not lie within the purview of powers granted the Congress."

4. Rights of Conscience.

In a letter to Jefferson in October 1788, Madison wrote that "the *rights of conscience*, in particular, if submitted to public definition would be narrowed much more than they are likely to be by an assumed power" (emphasis added). Boyd (ed.), 14 *Papers of Thomas Jefferson*, 18 (1958). Thus, Madison clearly stated that those unenumerated rights under the Ninth Amendment which were not specifically enumerated in the other amendments to the Constitution are or include the rights of conscience.

According to Professor Brandt in his biography of Madison, "Madison looked upon liberty of conscience as the fundamental factor in freedom of religion, and religious freedom, to judge from the concentrated attention he gave it, as the fundamental freedom." I Brandt, *James Madison*, 243

(1941). When Madison wrote to Jefferson, his past experience gave him reason to fear that it might be impossible to secure an amendment granting complete religious freedom. He had failed to secure such a guarantee when he wrote the religious freedom article of the Virginia Declaration of Rights, although he had secured a change that guaranteed free exercise of religion as opposed to mere toleration in its exercise. If these were the difficulties encountered in Virginia, it might have proved much more difficult to secure a satisfactory response from those states that had established churches.

Nevertheless, Professor Brandt indicated that when Madison introduced what became the First Amendment, he put forward a proposal that guaranteed total religious freedom and prevented any attempt by Congress to favor one religious sect over another. "Moreover, Madison tenaciously defended his proposal in the House and wrote all succeeding drafts of the Amendment. The House Amendment sent to the Senate read: 'Congress will make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience.' When the Senate emasculated this version, Madison, as chairman of the House Conferees was successful in having his final House version reinstated. The 'rights of conscience' clause was eliminated but the sense of Madison's version — total separation of church and state and exclusion of outright governmental aid to any religion was preserved." Kelley at 824.

If we examine Madison's letter to Jefferson of 1788, with Madison's attempt to include the rights of conscience in his religious liberties amendment to the Bill of Rights, it would seem plausible that in failing to include the rights of conscience under the First Amendment, Madison determined that such rights would be retained by the people under the Ninth Amendment of the Constitution and that the rights of conscience were not to be submitted to public definition and could not be narrowed by an assumed power under the First Amendment.

Thomas Paine specifically defined these natural unenumerated rights as those the individual can exercise under his own power without need of the protection and security of the government. He described them as "retained". Paine, *Rights of Man* at 110-111 (1961). It seems clear that these retained rights under the Ninth Amendment include the rights of conscience of James Madison to the extent that those rights, under Paine, can be exercised by the individual without government interference, and are not those rights which the individual needs the government to secure or protect for him or her. The individual does not need the aid of the government to secure the rights of conscience not to kill or not to pay for killing. This right is within the power of the individual to exercise if left alone by the government.

From the history of the adoption of the Ninth Amendment, it is clear (1) that the amendment was adopted to protect unenumerated rights not found in the first eight amendments to the United States Constitution, (2) that these rights do not lie within the purview of powers granted the Congress, (3) that these rights cannot be qualified as other fundamental rights have been, and (4) that they include "the rights of conscience". Thus, the Ninth Amendment can be viewed as the constitutional affirmation of unenumerated rights as well as a rule of construction stating that the enumeration of some rights does not deny others.

5. The Right of Conscience Not to Kill or to Pay for Killing.

The rights of conscience not to kill or to pay for killing (*i.e.*, the right not to participate in killing) is retained by the person when he or she enters into a state of society and is protected uniquely in our Constitution under the Ninth Amendment. These rights are absolute and, therefore, cannot be abridged by any qualifying court-made tests such as has been the case with the First Amendment. The amendment prohibits either its

"denial" or "disparagement", meaning it can neither be completely taken away nor impaired, "disparaged" in part. The right is not subject to any judicial qualification and extends to the payment for killing just as to the killing itself. It is absurd to think the government would pass a law prohibiting murder but not convict someone of murder who paid for a murder to be done by another person. The law makes no such distinction in its criminal code and no such distinction should be made here.

Further, the Ninth Amendment is applicable to the entire Constitution, Kelley at 835, and thus it takes precedence over Article I, Section 8, the taxing power of the United States Constitution. Under *Marbury v. Madison,* 1 Cranch 137, 174 (1803) and *Meyers v. United States,* 272 U.S. 52, 53, 151 (1926), it is a principle of constitutional interpretation that real effect should be given to all parts of the Constitution. The Ninth Amendment must be given real effect and in juxtaposition to the taxing power. The power to tax obviously is not absolute; it is a delegated power to the government; it has been qualified. The Ninth Amendment right, however, is absolute and is not to be exercised by the government, but by the person. Therefore, the Ninth Amendment takes precedence over Article I, Section 8 and the individual's right to do no affirmative act which will involve him or herself in killing must be sustained as a natural right not divested when an individual enters into a state of society.

6. The Supreme Court's Interpretation of the Ninth Amendment.

Analysis of the Ninth Amendment has resulted in one author concluding: "There exist rights other than those set out in the first eight amendments. It [the Ninth Amendment] was intended to preserve the underlying theory of the Constitutional Convention that individual rights exist independently of government and to negate the Federalist argument that the enumeration of certain rights would imply the forfeiture of all others." Kelley at 835.

But, the controlling judicial decisions have reflected the point of view of Justices Reed and Black that the Ninth Amendment is simply a companion to the Tenth and merely declarative of the fact that all rights and powers not given to the federal government are retained by the people *qua* states. The Ninth and Tenth Amendments should be taken together with amendments one to eight as simply statements concerning the relationship of the federal government and the states. This was Justice Stewart's argument in *Griswold v. Connecticut,* 381 U.S. 479 (1965). According to another author: "While Justice Stewart's contention, therefore, is not lacking in support, it appears to confuse the very purposes for which the Ninth and Tenth Amendments were adopted and the subjects with which they deal. The Constitution enumerates no retained state powers. States, pursuant to the Tenth Amendment, retain the residue of powers ungranted to the federal government. Nothing in the history of the adoption of the Tenth Amendment, the Supreme Court has said, 'suggests that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment . . .'" Abrams, *What Are the Rights Guaranteed by the Ninth Amendment?,* 53 Amer. Bar Assoc. J., 1033, 1036 (1967). He continues: "The Ninth Amendment is different. While no retained states' rights are enumerated in the Constitution, many rights retained by the people are enumerated through Article I, Section 4 and the first eight amendments. Insofar as the Ninth Amendment was designed to protect against the possibility that the retained rights of the people were insufficiently specified, the amendment suggests — as the tenth does not — that certain reserved rights may override certain broadly granted federal powers." *Id.*

> "In this respect, consideration of Congress' power to lay and collect taxes together with its concomitant power 'to make all laws which will be necessary and proper' to effectuate the taxing power is instructive. Toward the outset of the

debates in the House with respect to the adoption of the Bill of Rights, Madison, a staunch opponent of efforts to limit the powers of the federal government to those 'expressly stated in the Constitution', made perfectly clear his view that the power to tax should be subject to what ultimately was adopted as a portion of the Ninth Amendment."

and:

"Taken together, the taxing cases well illustrate that the otherwise unencumbered enumerated powers of Congress are simultaneously limited by the first eight amendments to the Constitution and shaped by those amendments. That being true with respect to those amendments, it follows that, to the extent that the Ninth Amendment was designed to protect rights omitted from the enumeration in the first eight amendments, Congress is no more free to limit or destroy those rights than it is to abrogate other rights protected by the Bill of Rights." Abrams at 1037.

This modern view, which is most in accord with the intent of the framers, is also the petitioners' position. Whatever the two Supreme Court variations are on this modern theme — Justice Goldberg or Justice Douglas (following), both agree that the Ninth Amendment protects unenumerated rights. "The concept of liberty is not restricted" to the specific terms of the Bill of Rights, and embraces rights "not mentioned explicitly in the Constitution . . . by the language and history of the Ninth Amendment", according to Justice Goldberg. J. Goldberg in *Griswold v. Connecticut* at 476-87.

Further, Justice Goldberg acknowledged that the Ninth Amendment could not be a "source of rights". "The rights, if

any, protected by the amendment were clearly thought by Madison to be retained by the people with or without the addition of the Ninth Amendment; the function of the amendment was to ensure that the Constitution would not be read so as to grant 'into the hand of the general government' all rights unspecified in the first eight amendments. In the same fashion, however, the First Amendment was not considered by its drafters to be a 'source' of the right of free speech. The right was inalienable; like the Ninth Amendment, the First was adopted so as to prevent a misconstrual of the Constitution which might result in the loss of inherent human rights. The Ninth Amendment is thus neither more nor less a source of rights than any of the first eight amendments." Abrams at 1038. But to the extent that a natural right exists at all, the Ninth Amendment is an affirmation of that existence. To the extent that the rights of conscience of which Madison spoke exists, the Ninth Amendment is the constitutional location of those rights. Also, to the extent that it is a rule of construction applicable to the entire Constitution and limiting the federal government from any kind of qualification the infringment of such retained rights is beyond the government's powers.

Thus far, in addition to the public power cases, but two rights have been put forth as retained rights under the Ninth Amendment. In *United Public Workers v. Mitchell,* 330 U.S. 75 (1947), it was claimed there was such a right of a government employee to engage in political activity and that was not upheld by Justice Reed and the Court, and in *Griswold v. Connecticut, supra,* the right of marital privacy was upheld by the Court, Justice Black dissenting.

In the most affirmative sense the right to which the petitioners allude here is the right to exercise their conscience in such a way as not to take another's life or to pay for the taking of that life. This right is guaranteed under the Ninth Amendment to the Constitution of the United States. But for the

petitioners' consciences it is not only a right, but a responsibility which they must uphold following from their strong convictions and their love for others.

But the Justice Douglas' argument in *Griswold* makes a little more certain the foothold upon which the government can stand in respect to finding affirmatively for the war tax refuser. Justice Douglas argues that the rule of construction to be applied in the Ninth Amendment is that the unenumerated rights are based on values implicit within the context of the specifically enumerated rights of the first eight amendments to the Constitution. For example, he finds freedom from discrimination as such a right under the Ninth Amendment. *Palmer v. Thompson,* 403 U.S. 217, 219, 237 (1971). In application of Justice Douglas' position this would mean that the claimed unenumerated right must be specifically related to one of those amendments and in our facts this is so. The right of conscience was in fact originally included in the First Amendment and is directly related to the free exercise of religion or the establishment thereof. (In specific respect to petitioners, *see* part B, *infra.*) Therefore, the argument that the Ninth Amendment would allow any right to be claimed as natural, inherent and pre-existing cannot hold here because the right not to kill and not to pay for killing is directly related to the free exercise of religion, an enumerated First Amendment right. According to Justice Douglas then, this right as firmly couched in the enumerated rights of the Constitution, prevents the Ninth Amendment from being used as a panacea for the claim of any rights whatsoever by the individual. In the courts below the petitioners consistently claimed their First Amendment, free exercise of religion rights but do not appeal them here because of the refusal of the Court to entertain similiar appeals presented by their brothers and sisters in the past. *See Anthony v. Commissioner of Internal Revenue,* Writ No. 77-1263, and *Bruce and Ruth Graves v. Commissioner of Internal Revenue,* Writ No. 78-981.

No other right derivative from following the will of God and the right of one's conscience is as ultimate as the right not to participate in the intentional killing of another human being. It is this right that petitioners claim as their own. They wish to exercise this natural right without governmental interference or compulsion. This interference has heretofore required them to participate in an act — the payment of military taxes — which contemplates the killing of another human being, based on the false proposition that the taxing power takes precedence over the fundamental rights of the person. Petitioners maintain that it is both a Christian and constitutional imperative that this right not be abridged and the lower courts ignored it without comment!

B. As Christians, the petitioners' duty to conscience not to kill is required by their religion.

War tax refusal is a basic application of Christian belief: that the uncaused God, self-existent, eternal, changeless, loves all those He creates in His own image, and by His own nature cannot sanction their participation in war or preparation for war. In turn, and in obedience to God, petitioners must love Him, or neighbors, friends, and enemies. In accord with one of His basic commandments, and the teaching of His Son, Jesus Christ our Lord, petitioners cannot kill, plan to kill, or commission killing by paying war taxes. Forced collection of war taxes by the Internal Revenue Service has violated petitioners' religious conscience both in belief and practice. The Internal Revenue Service by administering a tax code that permits the "rifling" of petitioners' bank accounts, without recourse, imposes on religious conscience a practice they cannot accept.

Petitioners' refusal to pay war taxes stems from their position of Christian pacifism. Christian pacifism is exercised in obedience to the commandment of love propounded by Jesus: "Thou shall love the Lord thy Gold with all thy heart, and with

all thy soul, and with all thy mind. This is the first and great commandment. And the second is like unto it; thou shall love thy neighbor as thyself." Matthew 22:39. *Holy Bible*, Revised Standard Version. Elsewhere Jesus defines neighbor as one who ministers to the afflicted, Matthew 25, and loves his enemies. Matthew 5: 43-48. To truly love God and neighbor in our day and age of wars and preparation for wars with their high costs, the Christian pacifist must come to grips with the problem of paying federal income taxes of which slightly over fifty percent goes to the military. The continuing development of more deadly weapons for conventional and nuclear war promises a continuation of the genocide of World War II and later conflicts. No longer is war a contest of competing armies with consequent military casualties. Victory, if it may be called such, now rests with the nation that can devastate the greater areas of enemy urban and industrial life. Victims of war are principally civilians, unprotected from bombs falling on their roofs and streets, roads, hospitals, churches and manufacturing plants. Herein is the most complete violation of Christian love, the waging of warfare against designated enemies (whom Jesus instructs us to love), inflicting death and crippling injuries upon the old and the young, children, husbands, wives, grandparents, destroying their homes and means of livelihood. We are commanded to pay taxes for this warfare and for its preparation. Our answer: "NO". Christian pacifists have not only the right but the duty to disobey existing tax laws that contravene the will of God. Further, with the advent of nuclear weapons, taxes have become the central vital nerve of military preparation that guarantees world destruction. Our citizens live in bondage to death by incineration, radiation, or the related effects of nuclear strategies defined as mutually assured destruction, counterforce and terminal exchange.

Military professionals and tax-paying citizens share culpability: the professional presses the button; citizens' taxes contribute to his salary, cost of training, research and development of his weapon, and the cost of the weapon. The modern technology that has capsulated time and space in our

one world has also exposed the common culpability of the tax-supported soldier and the tax-paying citizen for nuclear holocaust. Indeed, the citizen plays the leading role: conscription of money for development and procurement of the high-priced weapons is more important than conscription of the button pushers. The federal income tax links the taxpayer with the holocaust. A properly filed Form 1040 carries the odor of blood. The early Christian Church "forbade the receipt of money from magistrates polluted by war." Durland, *No King But Caesar?* (1975) at 13.

Why do petitioners object to paying war taxes?:

1. *Doomsday:* In World War III, predicted by the mid 1980's, it takes no more than ten hours for the final exchange of nuclear weapons to reduce our world to lifeless rubble.

2. *The demonic character of the SALT agreement:* President Carter and Premier Brezhnev hug each other in a transport of joy after signing an agreement that provides weapons capable of destroying each other's major cities 26 and 50 times over, respectively.

3. *The Pentagon playground:* The M-X missiles on a racetrack, the Trident submarines, the cruise missiles: grown men playing hide-and-seek with weapons of world-destroying power.

4. *Robbing the poor and hungry:* 900 million people with cash incomes of less that $75 a year live "so deprived as to be below any rational definition of human decency." Acutely hungry persons total about 460 million; add those who lack essential nutrients in their diet and who cannot function at full capacity and the number

rises to between one and two billion. Paying war taxes, we waste people." *U.S. Foreign Policy and Christian Ethics* (1977) at 172.

5. *Waste:* "The American people are devoting more resources to the war machine than is spent by all federal, state, and local governments on health and hospitals, education, old-age and retirement benefits, public assistance and relief, unemployment and social security, housing and community development, and the support of agriculture. . . . The result of this gigantic investment in security has been to make the American people among the most insecure on the planet." *Id.* at 113.

Those who will not recognize the linkage between war taxes and murder have either sold or buried their consciences, or, unfortunately have never been exposed to this obvious relationship. For the latter, their ignorance must be laid at the door of the *silent* church. The few in the know include the church hierarchy and denominational leaders who subscribe to any works of mercy except war tax resistance. Conscience raising can also be prescribed for those courts that have heard the arguments, bury them under a well-worn blanket of ill-fitting precedents while studiously ignoring the Ninth Amendment protection of Christian conscience. Up to this point the courts have decreed that Christian pacifists must pay for the killing of the innocent. Petitioners say, "NO", as do many others. The money we have is God-given and we are accountable for its use; we are not to waste it, we are not to use it to pay for the murder of our "enemies" Jesus told us to love. Petitioners continue to refuse to pay war taxes demanded by federal tax liens from the Internal Revenue Service because, very obviously, it is a much higher crime to break God's law than the tax code.

That war tax resisters are not considered bona fide conscientious objectors is inconsistent and unjust. To finance and pay for any activity is to be a participant. To commission killing is to be guilty of killing. To pay war taxes is to be a participant, a killer. That only a small number of Christians subscribe to the obvious does not reduce its correctness. Nor should the growing recognition of the direct link of war taxes to bloodshed deter the Court from acknowledging the fire-power of war taxes, the culpability of the payee, and the genuine need of refusers for relief from unjust practices and pressures of the Internal Revenue Service.

CONCLUSION

A nation which prides itself as one "under God" and which offers its citizens the protection of the First Amendment as Christians and the rights of the Ninth Amendment as citizens can do no less without becoming what it professes to overcome — the Godlessness in other nations.

Petitioners, Christians, can do no less whatever is decided. For the refusal to pay war taxes as civil disobedience, is for them none other than holy obedience to the practice of His peace.

Wherefore, a writ of certiorari should be issued to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

s/ William R. Durland
Attorney for Petitioners

APPENDIX

APPENDIX I — OPINION AND JUDGMENT OF THE UNITED STATES TAX COURT

T. C. Memo. 1978-74

UNITED STATES TAX COURT

HOWARD W. LULL and BARBARA B. LULL, Petitioners, v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 2460-77. Filed February 27, 1978.

Petitioners claimed deductions for "military expenditures" because of their moral and religious objections to paying taxes for military purposes. *Held,* respondent's motion for judgment on the pleadings granted.

Howard W. Lull, pro se.

Frank S. Armstrong, Jr., for the respondent.

MEMORANDUM OPINION

DRENNEN, *Judge:* Respondent determined deficiencies in petitioners' income taxes for the years 1974 and 1975 in the amounts of $1,067.60 and $1,050.66, respectively, and additions to tax under section 6653(a), I.R.C. 1954, in the amounts of $53.38 and $52.53, respectively. Due to concessions by the parties, the only substantive issue in dispute is whether petitioners may deduct the amount of $4,637 for the year 1974, and the amount of $3,284, for the year 1975, for "military expenditures" claimed as miscellaneous deductions on petitioners' income tax returns for those years.

A statutory notice of deficiency was mailed to petitioners by respondent on December 14, 1976, wherein it was determined,

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among other things, that the deductions for military expenditures mentioned above were not allowable.

On March 15, 1977, petitioners filed a petition with this Court in which they alleged that the respondent erred in disallowing the claimed deductions for military expenditures and in asserting the additions to tax. Respondent filed an answer to the petition denying such allegations on April 21, 1977.

On October 21, 1977, respondent filed a Motion For Judgment on the Pleadings on the grounds that respondent is entitled to judgment as a matter of law on the undisputed facts appearing from the pleadings. Petitioners objected and both parties filed a written memorandum supporting their positions. The motion was argued by the parties before the Court on January 31, 1978, at the conclusion of which the Court granted respondent's motion for judgment. That action is the subject of this opinion.

Rule 120, Rules of Practice and Procedure, U.S. Tax Court, makes provision for a motion for judgment on the pleadings "After the pleadings are closed but within such time as not to delay the trial." This motion meets that time frame. The purpose of such a motion is to raise the legal question of whether the petition states a claim on which relief may be granted, thus avoiding unnecessary trial time if answered in the negative. A judgment on the pleadings may be requested even though the allegations in the petition have been denied and, for purposes of the motion, the allegations of fact in the petition will be deemed admitted. Accordingly, we concluded that the motion was proper. *Russell v. Commissioner,* 60 T.C. 942, 944 (1973).

In their petition petitioners alleged that the military expenditure deductions claimed on their returns were sufficient to reduce their income tax by the percentage of the budget allotted to the military and that their tax refusals are based on

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Christian belief, constitutional rights, conscientious objections, natural rights, militarism, and peace making. An attachment to the petition discusses each of these bases, as does petitioners' memorandum in opposition to the motion.

It is a well established principle of tax law that deductions are a matter of legislative grace and unless Congress provides for a deduction in the law it is not allowable. *New Colonial Ice Co. v. Helvering,* 292 U.S. 435, 440 (1934); *Montgomery v. Commissioner,* 64 T.C. 175, 182 (1975). So basically, since petitioners can point to no provision in the statutes that provides for a "military expenditures deduction," they are not entitled to such a deduction.

Furthermore, each of the reasons alleged by petitioners for claiming the deductions and their "tax refusal" have been considered, directly or indirectly, by this and other courts on many occasions and have consistently been held not to be valid grounds for refusal to pay tax.

In *Muste v. Commissioner,* 35 T.C. 913 (1961), this Court held that a taxpayer does not have the right to refuse to comply with the law because it may not be in accord with the dictates of his conscience or religion. And in *Russell v. Commissioner, supra,* this Court stated:

> Even though the conduct of the United States in Southeast Asia may have been in conflict with her religious views, her disapproval of such conduct for religious reasons does not give her the right to choose not to pay her share of the income tax. * * *

In *Autenrieth v. Cullen,* 418 F.2d 586 (9th Cir. 1969), cert. denied, 397 U.S. 1036 (1970), the Court of Appeals said:

> We hold that nothing in the Constitution prohibits the Congress from levying a tax upon all persons, regardless of religion, for support of the general government. The fact that some persons may object, on religious grounds, to some of the things that the government does is not a basis upon which they can claim a constitutional right not to pay a part of the tax. *Kalish, supra,* [*Kalish v. United States,* 411 F.2d 606 (9th Cir. 1969), cert. denied, 396 U.S. 835 (1969)], is analogous.

See *Muste v. Commissioner, supra,* for the same principle.

Both *Muste v. Commissioner,* and *Russell v. Commissioner, both supra,* specifically rejected the contention that the Nuremberg Principles prevented payment of the taxes in issue.

Petitioners' assertions under the headings of "conscientious objections," "militarism," and "peacemaking," that they should not be required to pay taxes that would be used for military expenditures again pertain to their religious and moral objections to such expenditures and do not present new or meritorious reasons for allowance of the deductions.

Petitioners also alleged, under the heading "Alternative Tax Payments" that they had contributed the amounts of their "refused taxes" to charitable organizations and argue in the memorandum that this "places the war-tax refusers in double jeopardy: it both disallows war-tax refusal for religious reasons, and the expending of equivalent amounts for charitable purposes." In response to a question asked by the Court at the hearing, petitioner, Howard W. Lull, stated that petitioners claimed these charitable contributions as deductions on their returns for the following years. And as noted in *Russell v.*

Commissioner, supra, the payment of an "alternative tax" has no bearing on petitioners' tax liability—that is a matter delegated to Congress.

At the argument on respondent's motion petitioner, Howard W. Lull, acknowledged that he found no provision in the statutory law and no precedent in the judicial decisions which would support his claimed deductions; nevertheless he expressed a wish or desire to restate from the witness stand the philosophy back of his cause in the hope that the Court would change its mind. We understand petitioner's desire to champion his cause but pointed out to petitioner that he had chosen the wrong forum, as had so many war-tax protesters; the Courts cannot allow the deduction unless Congress provides for it. We think the already overcrowded courts are not the place for such individuals to repeatedly attempt to publicize their cause.

Since petitioners alleged no facts in their petition which would prove error in respondent's imposition of the addition to tax for negligence provided in section 6653(a), respondent's action was sustained.

After the Court granted respondent's motion for judgment on the pleadings, respondent submitted a decision document reflecting the reduced deficiency resulting from the concessions of the parties. Petitioners agreed that the computations were correct and had no objection thereto. Consequently,

> *Decision will be entered in accordance with respondent's computation.*

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UNITED STATES TAX COURT

HOWARD W. LULL and BARBARA B. LULL,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 2460-77

O R D E R

For reasons appearing in the record, respondent's "Motion to Vacate and Correct Decision will be treated as a "Motion to Correct Decision." Accordingly, it is

ORDERED that respondent's Motion to Correct Decision is granted and the ORDER and DECISION entered by the Court in this case on February 27, 1978, is corrected by striking, on page — 2 — thereof, the reference to sub-paragraph "(b)" of section 6653 and substituting in lieu thereof subparagraph "(a)".

(Signed) W.M. DRENNEN
Judge

Dated: Washington, D.C.
April 19, 1978

Appendix I

UNITED STATES TAX COURT

Washington, D.C. 20217

PETER W. HERBY,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 10897-75

ORDER AND DECISION

Pursuant to the Memorandum Opinion (T.C. Memo. 1978-119) filed herein on March 27, 1978, it is

ORDERED: That respondent's motion for summary judgment filed June 7, 1977, is granted.

ORDERED AND DECIDED: That there is a deficiency of $181.00 in petitioner's Federal income tax for the year 1974.

s/ Howard A. Dawson, Jr.
Howard A. Dawson, Jr.
Judge

Entered: Mar. 30, 1978

Appendix I

T.C. Memo. 1978-119

UNITED STATES TAX COURT

PETER W. HERBY, Petitioner v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket Nos. 10897-75, 2686-77. Filed March 27, 1978.

Peter W. Herby, pro se.

William Brackett, for the respondent.

MEMORANDUM OPINION

DAWSON, *Judge:* These motions were assigned to and heard by Special Trial Judge Murray H. Falk. The Court agrees with and adopts his opinion which is set forth below.[1]

OPINION OF THE SPECIAL TRIAL JUDGE

FALK, *Special Trial Judge:* Docket No. 10897-75 is before the Court on respondent's motion for summary judgment, filed pursuant to Rule 121, Tax Court Rules of Practice and Procedure, and docket no. 2686-77 is before the Court on respondent's motion to dismiss, pursuant to Rule 120, Tax Court Rules of Practice and Procedure, for failure to state a claim. Petitioner filed objections and a memorandum brief in opposition to both motions and both parties' oral arguments were heard.

1. Since these are pre-trial motions and there are no issues of material fact, the Court has concluded that the post-trial procedures of Rule 182, Tax Court Rules of Practice and Procedure, are not applicable in these particular circumstances. This conclusion is based on the authority of the "otherwise provided" language of that rule.

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Respondent determined deficiencies of $181 and $749 in petitioner's federal income taxes for 1974 and 1975, respectively, and an addition to tax under section 6653(a)[2] for 1975 in the amount of $37.45. At issue is a deduction claimed by petitioner as a "miscellaneous deduction" in respect of his conscientious objections to the payment of federal income taxes to support war.

At the time each petition was filed, petitioner resided at Salem, Virginia.

Petitioner's allegations of error in both petitions are substantially identical. He avers:

> Since 8/29/72 I have been legally recognized by the government as a conscientious objector to war because of religious beliefs. Since 61% of federal taxes go to support war, I cannot in good conscience pay these taxes and so claimed a war tax deduction on my * * * tax form. I claim the First and Ninth Amendments as valid basis for my action and non-payment of federal income tax.
>
> I have paid an amount equal to my federal taxes to a soup kitchen, medical clinic and hospitality house in Washington, D.C. which serve the poor of that city. I chose this as a worthy alternative because it provides services to citizens which the federal taxes might preferably have been spent on.

2. All section references are to the Internal Revenue Code of 1954, as amended, unless otherwise indicated.

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Respondent's motions must be granted if there is no genuine issue as to any material fact and a decision in respondent's favor may be rendered as a matter of law. Rule 121, Tax Court Rules of Practice and Procedure; *Anthony v. Commissioner,* 66 T.C. 367, 368 (1976). These criteria are met here and the motions are hereby granted. The law is so well settled that no extended discussion is necessary.

We do not doubt, nor does respondent attack, the sincerity of petitioner's convictions. His classification as a conscientious objector for purposes of our military conscription laws does nothing more than bolster a point not in issue.[3] For the purpose of these motions, respondent admits all of the material allegations of the petitions.

"The requirement that the petitioner bear * * * [his] fair share of the income tax does not interfere with the right to exercise * * * [his] religion." *Russell v. Commissioner,* 60 T.C. 942, 946 (1973). The taxing statute does not violate the First Amendment guarantee of religious freedom in these circumstances. *Anthony v. Commissioner, supra* at 373; *Muste v. Commissioner,* 35 T.C. 913, 918-919 (1961).

The Ninth Amendment cannot be applied to negate section 8 of article I of the Constitution, which grants to Congress the power to lay and collect taxes.[4] See *Autenrieth v. Cullen,* 418

3. If it is petitioner's position that there ought to be an accommodation made in the tax laws with regard to conscientious objectors, then he should address that argument to the Congress. Cf. *United States v. Seeger,* 380 U.S. 163 (1965) (tracing history of legislative action in respect of accommodations made in the military conscription laws with regard to conscientious objectors).

4. "It [the Ninth Amendment] was intended to preserve the underlying theory of the Constitutional Convention that

(Cont'd)

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F.2d 586, 588 (9th Cir. 1969), cert. denied 397 U.S. 1036 (1970). Basically, petitioner objects to the way the government spends its money. But, a taxpayer's disagreement with the policies of the government, however sincere, does not justify nonpayment of income taxes. E.g. *Crowe v. Commissioner,* 396 F.2d 766 (8th Cir. 1968) (per curiam), affg. a Memorandum Opinion of this Court; *Ward v. United States,* 344 F.2d 316 (10th Cir. 1965); *Swallow v. United States,* 325 F.2d 97 (10th Cir. 1963), cert. denied 377 U.S. 951 (1964); *Farmer v. Rountree,* 149 F. Supp. 327 (M.D. Tenn. 1956), affd. 252 F.2d 490 (6th Cir. 1958) (per curiam), cert. denied 357 U.S. 906 (1958).

Finally, petitioner's payments to other groups do not satisfy his income tax obligations. *Egnal v. Commissioner,* 65 T.C. 255 (1975); *Russell v. Commissioner, supra.* Congress, not petitioner, has the power to tax and spend under the Constitution.

Petitioner did not brief or argue the question of his liability for the asserted addition to tax under section 6653(a)[5] for 1975.

(Cont'd)

individual rights exist independently of government, and to negate the Federalist argument that the enumeration of certain rights would imply the forfeiture of all others. The Ninth is simply a rule of construction, applicable to the entire Constitution." Comment, "The Uncertain Renaissance of the Ninth Amendment," 33 U. Chi. L. Rev. 814, 835 (1966).

5. "If any part of any underpayment * * * is due to negligence or intentional disregard of rules and regulations (but without intent to defraud), there shall be added to the tax an amount equal to 5 percent of the underpayment."

In any event, it is clear that petitioner intentionally claimed a deduction for which he knew there was no provision in the Internal Revenue Code. His sincerity in doing so does not negate that intent. Cf. *United States v. Malinowski*, 472 F.2d 850 (3d Cir. 1973), affg. 347 F. Supp. 347 (E.D. Pa. 1972), cert. denied 411 U.S. 970 (1973) (criminal willfulness not negated by good faith belief in the immorality and illegality of Vietnam War); *United States v. Douglass*, 476 F.2d 260 (5th Cir. 1973) (criminal willfulness not negated by sincerely held belief in the unconstitutionality of the internal revenue system).

Accordingly, respondent's motions will be granted in both dockets.

Appropriate orders and decisions will be entered.

APPENDIX II — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1565

Howard L. Lull and Barbara B. Lull,

Appellants,

-versus-

Commissioner of Internal Revenue,

Appellee.

No. 78-1567

Peter W. Herby,

Appellant,

-versus-

Commissioner of Internal Revenue,

Appellee.

Appeals from the United States Tax Court at Washington, D.C.

Appendix II

Argued: May 8, 1979. Decided: July 12, 1979

Before RUSSELL, Circuit Judge, FIELD, Senior Circuit Judge, and WIDENER, Circuit Judge.

William R. Durland and (Sebastian K.D. Graber, Graber & Townsend on brief) for Appellants; Robert S. Pomerance, Tax Division, Dept. of Justice (M. Carr Ferguson, Assistant Attorney General, Gilbert E. Andrews and Carleton D. Powell, Tax Division, Dept. of Justice on brief) for Appellee.

PER CURIAM:

The appellants are taxpayers who sought deductions from their federal income taxes in the years 1974 and 1975 based on their estimated proportionate share of certain federal military expenditures during those years. They based their right to such deductions not on any congressional grant but on their alleged conscientious religious objections to war and their alleged constitutional protection of such religious objections under the First Amendment. The Tax Court in separate opinions denied the deductions and accordingly found tax deficiencies in the years in question against the appellants.[1] The appellants seek

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1. The Tax Court opinion as to appellants Lull is unofficially reported at P-H Memo T.C., par. 78,078 (1978). This decision was corrected by order of the Tax Court dated April 19, 1978.

The Tax Court opinion as to the appellant Herby is unofficially reported at P-H Memo T.C., par. 78,119 (1978).

Appendix II

review by this court of those decisions pursuant to 26 U.S.C. §7482.

We find no error in the decisions of the Tax Court and affirm for the reasons so well stated by that court in its opinions, which are reported as an appendix to this opinion.

AFFIRMED.